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NTSB Order No. EA-3817

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 5th day of March, 1993

U.S. JET, INC.)	
)	
Applicant,)	
)	
v.)	
)	Docket 104-EAJA-
JOSEPH DEL BALZO,)	SE-9911
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Both applicant and the Administrator have appealed from the initial decision issued by Administrative Law Judge William A. Pope, II in this proceeding.¹ In that decision, the law judge awarded applicant certain attorney fees and expenses in connection with its defense of Administrator v. U.S. Jet, Inc. On appeal, applicant protests the law judge's reduction of

¹The law judge's initial decision is attached.

claimed fees and expenses. In contrast, the Administrator contends that, because his litigating position was "substantially justified," no fees or expenses should have been awarded.² We grant the Administrator's appeal and deny that of applicant. A discussion of the applicable law, as well as a history of this proceeding, is necessary to understand our resolution of the questions presented to us.

The Equal Access to Justice Act (EAJA) requires the government to pay certain attorney fees and other specified costs to a prevailing party unless the government establishes that it was substantially justified in its position or that special circumstances would make an award of fees unjust. 5 U.S.C. 504(a)(1); Application of Smith, NTSB Order EA-3648 (1992) slip op. at 4. To find that the Administrator was substantially justified, we must find his position reasonable in fact and law, i.e., the legal theory propounded is reasonable, the facts alleged have a reasonable basis in truth, and the facts alleged will reasonably support the legal theory. Id., citations omitted; see also Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541 (1988). Reasonableness in fact and law also is to be judged as a whole, and should include an assessment, as relevant, of whether there was sufficient reliable evidence initially to prosecute the matter. Catskill Airways, Inc., 4 NTSB 799 (1983).

Especially relevant to the case before us are holdings that

²"Substantially justified" is a term used in the Equal Access to Justice Act, and is discussed further infra.

substantial justification may be demonstrated even where charges have been withdrawn or an action has been dismissed, as EAJA's substantial justification test is less demanding than a party's burden of proof. Administrator v. Pando, NTSB Order EA-2868 (1989). See also Federal Election Com'n v. Rose, 806 F.2d 1081 (D.C. Cir. 1986) (EAJA) (it is not whether the government wins or loses or whether the government appeals that determines whether its position is substantially justified). With this preface, we turn to a summary of the pertinent events in this case.

On January 13, 1990, the Administrator issued an order (complaint) revoking applicant's Part 135 air carrier certificate. The order alleged that US Jet lacked the qualifications necessary to hold its certificate. Applicant was charged with violating numerous rules in connection with three types of alleged violations.³ The incidents on which the complaint was based occurred in 1985, 1986, and 1987.⁴

³The rules cited in the complaint were 14 C.F.R. 135.179(a)(1), 135.79(b)(3), 135.385(b), 135.63(c), 135.261(b), 135.63(a)(4)(vii), 91.29(a), 43.13(a), and 91.9. The three types of incidents cited in the initial complaint can be summarized: a flight that allegedly took off overweight from Washington National Airport and jettisoned fuel prior to landing at Ocean City, MD (applicant was also charged with revising the load manifest after the incident to under-report the aircraft's takeoff weight); two instances where a pilot was not provided required rest time and applicant failed to maintain accurate duty time records; and numerous instances of operation of aircraft when required equipment was not in working order.

⁴At the hearing, the Administrator sought to amend the complaint to, among other things, permit reference to and proof of other incidents supporting the cited violations. The law judge denied the request. Our analysis does not require that we review this issue; our decision is based on the complaint as originally filed. In this regard, we also note our agreement

Applicant sought to have the complaint dismissed under 49 C.F.R. 821.33, our stale complaint rule.⁵ The law judge initially denied this request but, following a number of days of evidentiary hearing, he reversed himself and granted the motion by order entered March 7, 1990 (ID#1⁶). The law judge concluded, citing Administrator v. Rothbart and Voorhees, NTSB Order EA-3052 (1990), that, even though the complaint raised qualification issues, such issues would not prevent dismissal on staleness grounds where the allegation of a lack of qualification was merely a device to avoid dismissal of the complaint as stale.

The Administrator appealed the law judge's decision, but his appeal was late-filed and was, therefore, dismissed by this Board. Administrator v. U.S. Jet, Inc., NTSB Order EA-3150

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with the Administrator (Appeal at note 9) that the law judge should have analyzed the original complaint's compliance with the stale complaint rule, rather than reviewing this issue after reducing the scope of the complaint through the grant of various motions to dismiss certain paragraphs of the complaint. See also footnote 12, infra.

⁵See, e.g., Administrator v. Zanlungni, 3 NTSB 3696 (1981).

In short, rule 33 provides that, except in cases where lack of qualification is at issue (in which case the rule does not apply), the Administrator's failure to serve the Notice of Proposed Certificate Action (NOPCA) on a respondent within 6 months generally will result in dismissal of the complaint, unless the Administrator can establish good cause for the delay.

In applying this rule, the allegations of the complaint are to be taken as true. 49 C.F.R. 821.33 (b)(1). The purpose of the rule is to ensure respondents timely notice of the Administrator's investigation so that they may have a fair and equally timely opportunity to develop evidence in their defense.

⁶Because there are two initial decisions involved here, we have labeled them ID#1 (the decision granting the motion to dismiss the underlying complaint for staleness) and ID#2 (the decision granting the EAJA application).

(1990). Thus, we did not address the merits of the law judge's conclusion that the complaint should be dismissed as stale.

Applicant, thereafter, filed the instant EAJA request, seeking \$59,945.08 in attorney fees and expenses. The Administrator demurred, arguing that his position had been substantially justified, despite the law judge's procedural ruling.

In the EAJA proceeding, Administrative Law Judge Pope ruled that the Administrator "initiated adversary proceedings . . . with no reasonable basis in law." ID#2 at 5. He based this conclusion on his prior analysis (in ID#1) finding the complaint stale. That is, the law judge found that, because the Administrator pursued a complaint that he should have known would not survive against a stale complaint challenge, he pursued a legal theory that was not reasonable in law. ID#2 at 4-5. The law judge awarded applicant all but \$12,534.12 of the amount sought.⁷

Although we generally agree with the law judge's characterization of EAJA principles, we disagree with his finding that the Administrator's position was not reasonable in law. Specifically, we find that, in alleging lack of qualification, the Administrator did not engage in a subterfuge to avoid

⁷In light of our ultimate conclusion that no award should issue, we need not discuss the merits of applicant's appeal or the merits of the law judge's conclusion to reduce the amount claimed, nor need we act on applicant's subsequent motion that we make an additional award to cover expenses and fees since the initial decision.

dismissal pursuant to our stale complaint rule. The law judge misapprehends the meaning and import of Rothbart. Moreover, because the evidence clearly supports a finding that the Administrator's position was reasonable in fact, we find that, overall, the Administrator was substantially justified in pursuing this complaint.

1. The Administrator's position was reasonable in law.

In Rothbart, respondents were charged with allowing an intoxicated crewmember to operate an aircraft. The Administrator knew of the incident 26 months before the NOPCAs were issued. Although the certificate of the intoxicated pilot was only suspended, the Administrator proposed to revoke the certificates of the other two crewmembers (respondents in Rothbart). We applied our long-standing precedent that we

would look with disfavor upon any attempt by the Administrator to allege lack of qualifications merely as a device to avoid dismissal of the complaint.

Id. at 5, citation omitted. There was no showing or finding in Rothbart, based on precedent or otherwise, that respondents' actions demonstrated a lack of qualification. Indeed, in that unique case, the Administrator's actions made such a finding extremely difficult when he failed to explain why he had not proposed to revoke the certificate of the crewmember that actually was intoxicated.⁸ Thus, the facts of Rothbart supported

⁸We stated:

The Board is also particularly influenced by the fact that the Administrator ordered only a suspension, and made no

a conclusion that the Administrator alleged a lack of qualification for the purpose of avoiding dismissal.

Having found that the complaint against US Jet raised issues of lack of qualification under Board precedent (ID#1 at 5), the law judge had no basis to apply Rothbart; and doing so produced an illogical, inconsistent result because applying Rothbart required a finding that the lack of qualification charge is a sham. If the case legitimately presents an issue of lack of qualification (as the law judge found here), we do not look beyond to the Administrator's motivation, and Rothbart does not so hold.

Although the law judge found that the charges raised a lack of qualification issue under Board precedent, he was less than enthusiastic in this conclusion.⁹ We are not so unenthusiastic.

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allegation of a lack of qualification, with respect to Captain Day, even though his offense (operating an air carrier flight as pilot-in-command while under the influence of alcohol) was more serious than the violations of First Officer Rothbart and Flight Engineer Voorhees.

Id. at 6.

⁹"Assuming the allegations of the complaint in this case to be true, for the purposes of deciding a motion to dismiss under Section 821.33, I find that on their face, these allegations, which include an alleged load manifest violation committed with the knowledge and participation of management, together with maintenance and flight and duty time violations, are no more than minimally sufficient to establish a continuing pattern of violations, taking place over a period of several years. The only alleged offenses which might be said to be egregious are those involving the load manifest. The other violations are few in number, and are relatively minor in nature. However, considered in the aggregate, it is at least arguable that the pattern of violations, if proven, may show disregard for regulations and a lack of compliance disposition sufficient to

We have long held that a single incident or a pattern of abuse may justify certificate revocation.¹⁰ The Administrator here relies on a pattern of abuse, rather than a single incident. Appeal at 21. Therefore, we need not address whether one instance of falsification alone (if such an instance were proven) would support a lack of qualification finding. US Jet was accused of flight and duty time record-keeping violations. US Jet was also charged with operating an overweight aircraft, ditching fuel as a result, and attempting to cover up the incident through alteration of records. Numerous equipment violations also were alleged.¹¹ Taken as true for this purpose (as 49 C.F.R. 821.33 requires) and taken as a whole, the allegations more than adequately supported the Administrator's claim that US Jet lacked the qualifications to retain its certificate. Thus, the Administrator's position was not unreasonable in law.¹²

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demonstrate lack of qualification. Therefore, on this basis, I find that the complaint, which specifically alleges lack of qualifications, on its face, can be said to raise an issue of lack of qualification." ID#1 at 5.

¹⁰See, e.g., Administrator v. Westcor Aviation, Inc., NTSB Order EA-3076 (1989); Administrator v. Cassis, 4 NTSB 555 (1982), reconsideration denied, 4 NTSB 562 (1983), aff'd, Cassis v. Helms, Admr., FAA, et al., 737 F.2d 545 (6th Cir. 1984); Administrator v. Konski, 4 NTSB 1845 (1984); and Administrator v. McCarthney, et al., NTSB Order EA-3245 (1990).

¹¹We do not agree with the law judge that these were minor violations. Moreover, if true, they showed a tendency to ignore regulatory requirements.

¹²It has not been argued that, because the law judge found that certain of the charges did not support a regulatory violation and dismissed them, the Administrator's position was

2. The Administrator's position was reasonable in fact.

Because the law judge found that the Administrator had no reasonable basis in law to prosecute the matter, he had no cause to address the remaining aspect of the substantial justification test -- whether the Administrator's position was reasonable in fact. Indeed, he made no findings of fact regarding the evidence that had been presented.¹³ For the reasons we have already discussed, we disagree with applicant's argument in its reply to the Administrator's appeal (at 2) that what the FAA claims it could have proven at the hearing is irrelevant. It is not at all irrelevant. Whether the FAA had a reasonable basis in fact for its complaint against US Jet depends on whether the facts as alleged had a reasonable basis in truth. In addition, and as discussed earlier, to find a reasonable basis in fact we need not find that the FAA could have satisfied its burden of proof on the merits. We need only find that the FAA's allegations had a reasonable basis in truth.

"To fairly evaluate whether such a basis exists, some information attesting to this truth must be submitted to the deciding tribunal." Petition of Pine and Ter Keurst, NTSB Order EA-3724 (1992) at 7. Even a brief review of the testimony supports the conclusion that the FAA was reasonable in initiating the complaint against US Jet, and there is nothing in the record

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not reasonable in law.

¹³The Administrator had not completed his case-in-chief when the law judge discontinued the hearing and issued ID#1.

to indicate that at any point in its pursuit of the complaint the FAA learned of facts that would make its position unreasonable in fact.¹⁴

Testimony of James Forster, applicant's flight coordinator, Richard Sciolto, applicant's director of operations, and Gary Hodousek, a crewmember, supports the charges regarding the Washington to Ocean City flight. Dale Allen, an FAA operations inspector, testified regarding a base inspection of applicant's operations that turned up maintenance violations including those in the original complaint. John Brown, the prior principal operations inspector, testified about the flight and duty time-related violations and flight load manifests, but was not permitted to complete his testimony because the law judge terminated the proceeding by issuing his decision granting the motion to dismiss. Based on the testimony offered by the Administrator, we find that he had a reasonable basis in truth in initiating and pursuing the complaint. We see no need to belabor this issue, as US Jet does not challenge the Administrator's discussion of the testimony in the record (instead arguing, as noted, that it is not relevant). Having found a reasonable basis in fact and law, the Administrator's position was substantially

¹⁴In conducting our analysis, we need not and do not reach issues of witness credibility. The Administrator can be found to have had a reasonable basis in fact even if the law judge does not ultimately accept his witnesses' testimony. Petition of Smith, NTSB Order EA-3648 (1992). Instead, we have reviewed the record, including the evidence (demonstrated here by the testimony the Administrator was given the opportunity to present), to see if it can reasonably be interpreted to support the Administrator's allegations.

justified and no EAJA award may be authorized.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is denied; and
2. The Administrator's appeal is granted and the initial decision is reversed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.